Community Health Services, Inc., d/b/a Mimbres Memorial Hospital and Nursing Home *and* United Steelworkers of America District 12, Subdistrict 2, AFL–CIO–CLC. Cases 28–CA–16762, 28–CA–17278, and 28–CA–17390

February 28, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

On July 29, 2010, Administrative Law Judge William L. Schmidt issued the attached Supplemental Decision.[1] The Respondent and Acting General Counsel filed exceptions, supporting briefs, answering briefs, and reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings, and conclusions, and to adopt the judge's recommended Order.

ORDER

The National Labor Relations Board orders that the Respondent, Community Health Services, Inc., d/b/a Mimbres Memorial Hospital and Nursing Home, Deming, New Mexico, its officers, agents, successors, and assigns, shall pay the amounts set forth below, plus interest accrued to the date of payment, at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax and withholdings by Federal and State laws.

Employee	Amount
Acosta, Anthony	$4807.11
Amanambu, Austin O.	9583.99
Boyer, Ruth Mary	29,510.09
Gordon, Natalia	1670.16
Hayes, Cindy	2920.36
Hustead, Charles	306.91
Kavanaugh, Gary	3435.09
Lopez, Rudolph R.	$15,344.35
Loyd, Michael Scott	11,955.09
May Jr., David Allen	16,092.74
Parra, Judith	170.74
Pattarozzi, Daniel	4359.37
Syed, Nohail	4684.52
Total:	$104,840.52

Dated, Washington, D.C. February 28, 2011

Wilma B. Liebman,	Chairman
Mark Gaston Pearce,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

David T. Garza, Atty., for the General Counsel.
Bryan Carmody, Atty. (*Maya and Associates*), of Westport, Connecticut, for Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. The Board's decision in *Community Health Services, Inc., d/b/a, Mimbres Memorial Hospital*, 342 NLRB 398 (2004), adopted the recommended order of Administrative Law Judge Lana Parke that required Respondent to rescind: (1) the shift schedule modifications of January 31, 2001, in the respiratory department; (2) the work schedule modification for employee Garry Kavanaugh in April 2001; (3) the reduction in the weekly hours of work scheduled for the respiratory department employees that occurred in April 2001; (4) the fingerprint policy implemented on June 18, 2001; and (5) the suspension of Garry Kavanaugh pursuant to the unlawful fingerprint policy. It also required Respondent to reimburse employees for any loss of earnings and other benefits suffered as a result of its unlawful actions as prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970), plus the requisite interest. Later, the U.S. Court of Appeals for the Tenth Circuit enforced the Board's order. *NLRB v. Community Health Services, Inc., d/b/a, Mimbres Memorial Hospital & Nursing Home*, 483 F.3d 683 (10th Cir. 2007).

On July 18, 2008, the Regional Director issued the initial compliance specification (Specification I) that detailed the backpay as calculated by the regional compliance officer, the Regional Director's agent for such matters. Respondent (or Hospital) filed an answer detailing its objections to the allegations in Specification I and later filed an amended answer. On June 18, 2009, the Regional Director issued the first amended

[1] The underlying unfair labor practice decision is reported at 342 NLRB 398 (2004).

[2] We deny the Acting General Counsel's motion to change the name of the Respondent from "Community Health Services, Inc." to "Community Health Systems, Inc.," because it is based solely on information that was obtained from a search of the Respondent's website.

compliance specification (Specification II). Respondent's timely answered, again detailing numerous objections to the allegations contained in Specification II.

I opened a hearing on Specification II on July 21, 2009, at Deming, New Mexico. During the hearing, the parties submitted in evidence numerous relevant documents and adduced testimony from 12 witnesses. Near the conclusion of that hearing, counsel for the General Counsel sought leave to issue a second amended compliance specification following the close of the hearing in order to update the backpay calculations contained in Specification II and possibly add additional backpay claimants based on records the Hospital agreed to produce shortly after the close of the hearing. Respondent opposed. I declined to close the hearing but granted leave for the issuance of another compliance specification and recessed the hearing pending that action.

The Regional Director issued the second amended compliance specification (Specification III) dated September 15, 2009, claiming Respondent owed 19 employees backpay totaling $167,788.44. Respondent filed a timely answer to Specification III on October 13, 2009. Thereafter, I conducted two status conferences with the parties that resulted in a variety of stipulations and rulings described more fully below. Finally, on January 20, 2010, I granted the General Counsel's motion to close the record and set the date for the filing of posthearing briefs.

After considering the entire record,[1] resolving credibility issues based on a variety of factors, including the demeanor of the witnesses,[2] and after carefully considering the arguments in the posthearing briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. THE RECORD DEVELOPED AFTER THE HEARING RECESSED

Following the hearing recess on July 21, Respondent filed a motion to close the record dated August 5, 2009. In its motion, Respondent averred that the anticipated compliance specification "would likely name 'new' employees clearly creates a reasonable probability that additional evidence will be necessary" and argued that the hearing should be closed so a decision could be rendered on its affirmative defense that Board's remedial order was inapplicable to subsequent-hires, i.e., all employees employed after Respondent unlawfully reduced the standard work schedule in the respiratory department in April 2001. Respondent also argued that this approach might avoid future compliance proceedings. The General Counsel opposed on the ground that such a procedure would make my decision, in effect, nothing "more than just an interlocutory decision." On August 14, I denied the motion given the posture of the case at the time and the uncertainty as to whether future compliance proceedings could be avoided.

Specification III issued on September 15, 2009. It sets forth the backpay claims for 19 individuals (up from 15 in Specification II) allegedly employed in Respondent's respiratory department at one time or another in the period from April 2001 through July 18, 2009, the date when the last pay period closed prior to the hearing, in order to reimburse them for the losses they suffered as a result of the unlawful work-schedule reduction found by the Board in the underlying case. For those still employed in that department as July 18, 2009, Specification III also alleges that backpay continues to accrue because Respondent has never complied with the requirement that it rescind the unlawful schedule reduction as ordered. Finally, Specification III carried over the allegation in earlier specifications that Gary Kavanaugh is entitled to reimbursement for 1 day's pay because of his unlawful suspension on July 2, 2001. As noted, Respondent filed a timely answer on October 13, 2009.

Subsequently, I conducted status conferences with counsel on October 21 and November 23 in order to determine whether issues remained that would require the resumption of the hearing. During the October status conference, Respondent argued that the hearing should resume so it could adduce evidence about: (1) the changes in the employment status of the four additional backpay claimants alleged in Specification III; (2) the supervisory status of Paul Linder and Karen Wasson, two of the four additional backpay claimants in Specification III; and (3) its Affirmative Defense 37 that no further backpay accrued in any circumstance past August 28, 2007, because Respondent's duty to bargain ended on that date.

At the request of counsel for General Counsel, Respondent's counsel agreed to produce records supporting the first two matters. As to the third item, counsel for General Counsel argued that Affirmative Defense 37 was not relevant and, therefore, the hearing need not resume for the purpose of taking such evidence. I directed that Respondent submit an affidavit from the witness it proposed to call if the hearing resumed or an offer of proof detailing the testimony it would adduce in support of Affirmative Defense 37. See status conference minute with directions dated October 21, 2009,

During the November status conference, counsel for General Counsel, based on the records submitted by Respondent's counsel, stipulated that Linder and Wasson were statutory supervisors and moved to delete them as backpay claimants from Specification III. I granted that motion.[3] In addition, counsel for General Counsel stipulated to the receipt of documents showing the employment classification for Jamie Flores and Pedro Herrera, the two other employees added as backpay claimants in Specification III.[4] Finally, based on the Respon-

[1] In an Order dated January 25, 2010, I designated the documents filed after July 21, 2009, that have been made a part of the record in this case.

[2] My findings reflect various credibility resolutions based, in the main, on the factors summarized by Judge Medina in *U.S. v. Foster*, 9 F.R.D. 367, 388–390 (1949). All testimony and documentary evidence has been carefully considered. Evidence inconsistent with my findings is not credited. Added discussion of specific credibility determinations appear below.

[3] Taking this amendment into account, Specification III alleged that Respondent owed 17 employees backpay totaling $154,329.80.

[4] This stipulation obviated the need to obtain identification of these documents through a witness as Respondent' counsel argued during the October status conference when seeking a resumption of the hearing. As will be addressed below, Respondent argues that these two employees are not entitled to backpay because they were hired from the outset

dent's offer of proof dated October 30, submitted in compliance with my direction during the October status conference, counsel for the General Counsel again argued that the proposed testimony relating to Affirmative Defense 37 lacked relevance and should not be admitted.

On November 30, I issued a second status conference minute and an order to show cause summarizing the case status at that time and ordering the parties to show cause why the hearing should resume. On December 4, counsel for the General Counsel filed a motion to close the record. Respondent filed a response to my order to show cause and an opposition to General Counsel's motion to close the record dated December 8.

On January 20, 2010, I granted General Counsel's motion to close the record and fixed the date for the filing of briefs. See order granting General Counsel's motion to close the record and setting date for receipt of posthearing briefs. In doing so, I found that the testimony of the human resources director which Respondent sought in order to track employee classification changes would essentially be redundant inasmuch as Respondent's own classification documents had been admitted in evidence pursuant to stipulation during the November status conference.

In addition, I found in agreement with the General Counsel, that the testimony of Attorney Don T. Carmody described in Respondent's October 30 offer of proof would not be probative of any issue before me in this compliance proceeding. Respondent's offer of proof asserted that it would show by Mr. Carmody's testimony that Respondent "recognized the Union and satisfied its duty to bargain." Respondent argues that his testimony was essential to establish Respondent's claim in Affirmative Defense 37 that the backpay liability tolled on August 28, 2007, because it satisfied the duty to bargain over the unilateral reduction in hours in the respiratory department by reason of the Charging Party's failure to respond to several attempts by Mr. Carmody to meet for purposes of bargaining. Respondent asserted that it "was under no duty to preserve, indefinitely, the status quo ante" and that "(t)he Union's choice to withdraw from the collective bargaining process took away any opportunity for the parties to agree to the reduction in hours (which, incidentally, was a means to avoid a layoff of bargaining unit employees) or as the case may have been, to reach impasse on the subject." (R. offer of proof, p. 9.)

At the core of Respondent's Affirmative Defense 37 are Board cases that hold in one way or another that an employer may "(re)implement the prior unlawful changes" with the union's agreement or by bargaining to impasse over that subject at issue. *Five Star Mfg. Inc*., 348 NLRB 1301, 1339 (2006); *Mammoth Coal Co.*, 354 NLRB No. 83, slip op. at 45 (2009), citing *U.S. Marine Corp. v NLRB*, 944 F.2d 1305, 1322–1323 (7th Cir. 1991); *New Concept Solutions LLC*, 349 NLRB 1136, 1161 (2007); *Waterbury Hotel Management LLC*, 333 NLRB 482, 555 (2001); and *Eldorado Inc*., 335 NLRB 952, 959 (2001). By failing to respond to the various requests made by Respondent in 2007 for bargaining following the court's enforcement of the Board's order, the Union, according to Respondent, effectively deprived it of the opportunity to negotiate about the change made in 2001 that the Board and the court found unlawful. However, I concluded that principle from the *Five Star Mfg.* case and the other similar cases cited had no application here in the absence of a showing, or an offer to show, that Respondent had restored the status quo ante by rescinding the original unlawful reduction in hours as ordered by the Board. *Five Star Mfg.*, 348 NLRB 1339 ("If Respondent wants to change this situation, it can— after returning to the status quo ante, give the Union notice of a proposed change and bargain with the Union.") Because Respondent failed to take such action in advance of the 2007 bargaining requests, the Union had no duty to bargain under those circumstances.

Respondent continues to complain about my ruling concerning the testimony it proposed to elicit to support Affirmative Defense 37. (R. posthearing br., p. 12.) However, I reaffirm that conclusion here. Respondent provided no evidence at the July 21 hearing that the April 2001 reduction in the hours scheduled for the respiratory department found unlawful earlier had been rescinded, nor is there any suggestion in Respondent's Offer of Proof that it would show the status quo ante had been restored apart from the assertions made about statements by the former regional compliance officer addressed below. As Judge Rogas explained in fashioning the remedial order in *Mammoth*, the rescission remedial measure is intended to prevent the respondent from taking advantage of their wrongdoing to the detriment of the employees and to restore the status quo ante thereby allowing the bargaining process to proceed. Contrary to Respondent's contention, a bargaining representative does not waive its right to bargain over a mandatory subject where it refuses to meet and negotiate about that subject with an employer who has already implemented the change and ignores a court's order to restore the status quo ante as Respondent has done here.

In addition, I also concluded that Mr. Carmody's proposed testimony that the former regional compliance officer had advised Respondent it had nothing further to do in order to be in full compliance with the Board's order also lacked merit. Here, the Regional Director's three compliance specifications define his position concerning the status of Respondent's compliance. The various specifications issued in this case are clearly at odds with the verbal representations attributed to the former compliance officer in Respondent's offer of proof. Moreover, the Board has held that it is not bound by assurances of this nature given to employers by Board agents, especially when employee rights are at stake. *Aroostook County Regional Ophthalmology Center*, 332 NLRB 1616, 1619 (2001), citing *Martel Construction, Inc*., 311 NLRB 921, 927 (1993), enfd. 35 F.3d 571 (9th Cir. 1994). Hence, even if the former compliance officer made the statements attributed to her in the Offer of Proof, I conclude that they would have no probative value and that the hearing need not be resumed to receive that evidence.

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in a part-time or intermittent classification. General Counsel argues that their full-time work history controls their entitlement to backpay rather than their classification.

II. THE REIMBURSEMENT FORMULA AND ITS APPLICATION

A. Facts

The pertinent part of the remedy devised by Judge Parke and adopted by the Board provides:[5]

> Since Respondent has refused to bargain with the Union about certain terms and conditions of employment of represented employees . . . I shall order Respondent to rescind . . . its April 2001 reduction in respiratory department employees' hours . . . (and) make whole any employee for any loss of earnings and other benefits suffered as a result of its unlawful actions computed as prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

342 NLRB 401.

Based on a finding of fact originally made by Judge Parke that Respondent unlawfully reduced the weekly schedule of the respiratory department employees beginning in April 2001 from 40 hours per week to a range between 32 and 36 hours per week,[6] Miguel Rodriguez, the regional compliance officer, reviewed Respondent's records to determine which employees, if any, may have been adversely affected by this unlawful change. His investigation led him to devise a reimbursement formula that included two components, one for regular hours and another for nonregular or premium pay hours. The sum of the two components equaled the net backpay deemed due the included employees.

The compliance officer concluded that employees who consistently worked 32 or more hours per week (or 64 hours per pay period) after the unlawful reduction in hours occurred should be included in the specification on the ground that these employees had likely been harmed by Respondent's unlawful conduct. Further, he excluded from the specification employees who consistently worked 30 or less hours on the ground that they probably had not been affected by the unlawful change.

The compliance officer applied this interpretative gloss to all employees regardless of whether the Hospital classified them as a full-time, part-time, or PRN (on-call) employee. He provided this explanation at the hearing:

> Q. BY MR. CARMODY: I want to direct your attention back to your answers to Mr. Garza's questions. If I understood you correctly, you testified that any instance in which an employee did not consistently work at least 60 hours during a pay period, which is a two week period, were excluded from your, from the back pay, from the time specification; is that correct?
> A. That's correct.
> Q. Okay. How did you define for purposes of this calculation consistent(ly)?
> A. Consistent meaning one week they worked 63, another week they worked 72, another pay -- I'm sorry. Not week but pay period, they worked 72. The third pay period perhaps they worked 80. The fourth pay period they went back to 63. The fifth -- and so on and so on.
> JUDGE SCHMIDT: So you included that portion?
> THE WITNESS: Yes, starting from that first pay period where it showed that the employee started working —
> Q. BY MR. CARMODY: Yeah.
> A. —consistently in that general area.
> Q. Okay. North of 60 hours?
> A. Yes.
> Q. Now when you made the decision to exclude from the calculation employees who worked fewer than 60 hours on a pay period basis, did you do that because you considered these employees part-time?
> A. I did it because the Board order was clear that the number of hours went from 40 to between 32 and 36.
> Q. Uh-huh.
> A. So if employees work 20 a week, that means 40 every two weeks, and the Board order didn't encompass those employees, in my view.
> Q. And when you were, when you were putting together the back pay calculations, did the employee's status as full-time, part-time, or PRN have, carry any relevance to you?
> A. I was following the Board order, and the Board order said from 40 to 32 to 36. The Board order didn't distinguish between classification.
> Q. And so my question is, my question is did you distinguish; forget what the Board said. Did you—
> A. No. No. (Tr. 140–142)

The first component of the reimbursement formula is relatively simple. It assumes that included employees would have worked 80 regular hours per pay period. The included employees are credited for backpay calculated at their standard pay rate in all pay periods during which they worked less than 80 hours. The formula assumes that Respondent complied with the overtime laws or its own premium pay policies when the employee worked more than 80 hours in a given pay period, so any credit Respondent deserves because the employee worked beyond 80 hours is applied in the second prong of the formula.

The second component of the reimbursement formula seeks to compensate the included employees for the loss of work at premium rates of pay. The amount of these premium rates varied depending on the circumstance. Some involved the standard time and a half rate for work beyond 40 hours per week. Others involved a different premium rate for work on a holiday, a special call-in rate, or some other type of premium rate work. The compliance officer examined Respondent's records for a representative period (the calendar year 2000) and determined that the respiratory department employees worked at premium rates on average for 9.26 hours per pay period.

[5] In addition to the reimbursement remedy provided for certain employees in the respiratory department, a separate remedy requires that Respondent reimburse employee Garry Kavanaugh for his unlawful 1-day suspension. No issue exists as to Kavanaugh's separate reimbursement for this suspension.

[6] This finding of fact at 342 NLRB 400 states:

> Sometime in April, Respondent reduced the hours of its respiratory department employees (including unit employees) from 40 hours per week to 32 to 36 hours. Respondent did so without prior notice to the Union and without affording the Union an opportunity to bargain about the reductions."

Accordingly, he credited the included employees with 9.26 hours of work each pay period. In those pay periods during which the employee failed to receive 9.26 hours of premium pay work, he credited the employee with backpay calculated at an average of the employee's premium pay rates. In those pay periods when the employee worked more than 9.26 hours at premium pay, the Respondent received an offset or credit against the accumulated backpay. The sum of the losses calculated for the reduction in regular and premium pay hours represents the net backpay due to the included employees.

B. Further Findings and Analysis

Based on this record, I find the two-part reimbursement formula devised by the regional compliance officers to be reasonable. However, I find merit to some of the Respondent's claims that the Regional Director has applied this formula to employees at times it was not justified.

Respondent's Affirmative Defense 36 makes three separate claims. Thus, Affirmative Defense 36(a) claims, in effect, that the Board's remedy does not apply to any employee hired after the unilateral reduction in hours occurred. Affirmative Defense 36(b) claims, in effect, that the remedy only applies to full-time respiratory therapists rather than part-timers, PRN employees, or employees other than respiratory therapists. Finally, Affirmative Defense 36(c) claims that the Board's remedy does not apply to employees who did not suffer an unlawful reduction in hours following their employment. Affirmative Defenses 36(a) and (c) will be addressed in the next section.

I reject Respondent contention that the Board's remedial order only applies only to full-time respiratory therapists as claimed in Affirmative Defense 36(b). Respondent's assertion that the remedial order only applies to respiratory therapists and not other unit employees lacks merit as the remedial action devised by Judge Parke and adopted by the Board applies to all unit employees in the respiratory department without regard to their position.[7]

In support of its argument that the remedy should only apply to full-time employees, Respondent cites paragraph 8(f) of the consolidated complaint that states: "On or about April 23, 2001, the Respondent reduced the hours of its full-time employees." See paragraph 8(f) of the order further consolidating cases, second consolidated complaint, and notice of hearing, dated October 16, 2001. Respondent correctly notes that the complaint made no allegations concerning its part-time employees and asserts that the underlying decision makes no reference to them. Respondent further asserts that Judge Parke found no evidence that its use of PRN employees "represented a departure from past practice," and therefore, ruled against the General Counsel's complaint allegation (paragraph 8(e)) that it violated the Act by hiring nonbargaining unit employees to perform bargaining unit work around the first of April 2001. Therefore, Respondent argues that only those classified as full-time employees should be included in the specification.

I agree that the remedial action ordered applies only to full-time employees. But determining who is, and who is not, a full-time employee in this context is very problematic. Respondent relies in part on the following definitions supplied by Johanna Grant, the Hospital's human resources director since January 2007: (1) full-time employees are those who work 40 hours or more per week; (2) part-time employees are those who work 39 hours or less per week; and (3) PRN employees work on an "as needed" basis. (Tr. 150.)

Applying Grant's after-the-fact definitions strictly would have the effect of eliminating a remedy for all employees since the whole case is about Respondent's unlawful, unilateral action of reducing hours from 40 per week to 32 to 36 per week. In other words, it could be said, using Grant's definitions, that Respondent effectively reclassified its full-time employees to part-time employees when it took the unilateral action found unlawful by Judge Parke. Accepting Respondent's assertion that the remedial action only applies to full-time employees and then strictly applying Grant's definitions would lead to the absurd result that almost no one was entitled to backpay under this remedial order.[8] Using Grant's definitions, Respondent's own unlawful conduct blurred the line that divided a full-time employee from a part-time employee.

But the rote application of classification information from Respondent's records would also be misleading. For example, Respondent hired Anthony Acosta into a unit position on April 19, 2001, at or near the time of the unilateral change found unlawful. His personnel action form (PAF) shows that he was hired to work three 12-hour shifts per week, essentially at the high end of the range of hours to which the full-time employees' schedules were unlawfully reduced. Yet, the form classifies him as a part-time employee. But when Acosta transferred to a PRN status a year or so later, his PAF reflected that he changed from a "full-time" to a PRN status. (Tr. 153.) Although the record contains other evidence implying other characteristics that distinguished full-time employees and part-time employees, Respondent chose not to address them.

The General Counsel argues, in effect, that the classification of an employee is not relevant. Instead, he contends that the decision about who is, or is not, covered by the remedy should be based "on the parameters of hours specifically laid out by the Board in the Order" so that those who "consistently were working around 64 hours in two-week payroll period" should receive compensation. This approach, the General Counsel argues, "is a reasonable means for ascertaining the backpay losses suffered by discriminatees subject to a unilateral reduction of hours not remedied by Respondent."

I cannot agree entirely with the General Counsel's approach primarily because it ignores his own complaint in the underlying case and the conclusions reached by the trial judge, the Board, and the court of appeals based on that complaint. As

[7] This claim would apply to only one employee, Nohail Syed, who was classified as a respiratory therapist assistant.

[8] Appendix A of Respondent's own answer that sets forth its alternate calculation of the backpay due illustrates this point as it obviously applies Grant's dividing line rigidly. As a result, Respondent's calculations show that the status of employees shifts between part-time and full-time shifts from week to week depending on whether the employee worked 40 hours or more. Based on this computation, 4 of the 17 employees would receive backpay totaling a paltry $2603.05. In my judgment, Grant's definitions are largely self serving.

Respondent notes, the General Counsel specifically alleged in complaint paragraph 8(f) that Respondent reduced the hours of the "full-time employees" in April 2001. And in complaint paragraph 8(e) the General Counsel claimed that around April 1, 2001, Respondent hired "non-bargaining unit employees" (a reference, according to Judge Parke, to the PRN employees) to perform bargaining unit work in the respiratory department.

Judge Parke carried forward that complaint reference to "full-time employees" when stating the issues in her decision. I find it unreasonable to conclude, as the General Counsel apparently has, that, by dropping the modifier "full-time" in all future references, Judge Parke and all subsequent adjudicators of this case intended to find that the hours of the full time as well as part-time and PRN employees had been somehow unlawfully reduced. In fact, the Tenth Circuit's opinion plainly stated otherwise: "Also in April, the company *reduced the hours of full-time respiratory department employees* and hired additional part-time employees to make up the difference, without prior notice to the union." *NLRB v. Community Health Services, Inc., d/b/a Mimbres Memorial Hospital & Nursing Home*, 483 F.3d 685. [Emphasis mine] Moreover, none of the decisions in the underlying case make any reference to some type of harm suffered by the parttimers or PRN employees.

In addition, no basis in law exists to apply the reimbursement remedy here to any PRN employee even though a few may have reached the General Counsel's threshold (64 hours per pay period) for inclusion in the specification. In complaint paragraph 8(e) the General Counsel tacitly conceded that the PRNs were not unit employees and, in any event Judge Parke found that he failed to prove this allegation on the basis of evidence showing Respondent's past practice of hiring PRNs to supplement its regular work force. Nevertheless, the General Counsel applied the reimbursement remedy devised here to at least a few unrepresented PRN employees about whom no violation has been found. But even if the General Counsel had prevailed as to the allegation in complaint paragraph 8(e) that pertained to the PRNs, the remedy would have been to bargain with the employee representative and make whole the unit employees, not the PRNs, because Respondent "flooded" the unit with PRNs. For this reason, I find that the General Counsel, by applying his formula to PRN employees, has provided an unwarranted windfall to those persons.

Accordingly, I find that this aspect of the case has always been about the full-time employees in the respiratory department and no others. For the General Counsel to now claim that the remedy in this case applies to others as measured solely by the number of hours they worked is not, in my judgment reasonable, particularly with respect to the PRN employees.

Accordingly, I find merit to Respondent's claim that the remedial order here applies only to full-time respiratory department employees. However, I find this determination should be made after considering all of the relevant circumstances rather than merely the number of hours worked. Therefore, I find the General Counsel erred in failing to accord at least some weight to the actual classification of the backpay claimants during their work history.

Based on the rationale detailed above and for reasons detailed below, I recommend that the following adjustments to the backpay calculations set forth in Specification III.

1. *Myrna St. Jean Argant:* Specification III alleges Argant's back pay period began on or about July 28, 2002, and ended on or about August 10, 2002, the end of the last complete payroll period in which Argant worked in the respiratory department. Her initial hire PAF (R. Exh. 17) shows that she was employed as a part-time employee who would average of 36 hour per week. In the absence of other information that would contradict or explain Argant's designation as a part-time employee on her initial PAF, I have concluded that she should be excluded from a backpay award because of her part-time status.

2. *Jamie Flores*: Specification III alleges that Flores' back pay period begins on or about October 12, 2008, and continues to date. Flores' PAF prepared at the time he was hired shows that his status is that of a part-time employee to be scheduled for an average of 24 hours per week. The General Counsel's computation reflects that Flores met the compliance officer's own threshold for inclusion in just 9 of the 20 pay periods shown. Based on this evidence, I am satisfied that Flores has been a legitimate part-time employee from the inception of his employment and that he should be excluded on that ground at least through July 18, 2009. [9]

3. *Natalia Gordon*: Specification III alleges that Gordon's back pay period begins on or about February 24, 2002, and ends on or about November 16, 2002, the end of the last complete payroll period in which Gordon worked in the respiratory department. However, one of Gordon's PAFs (R. Exh. 3) shows that she became a PRN employee effective July 29, 2002. She requested this change in a written notice dated July 15. (R. Exh. 4.) Because she became a PRN employee in the middle of 2002 pay period no. 16, I have concluded that Gordon's backpay should cease to accumulate with 2002 pay period no. 15 that ended on July 20, 2002. Accordingly, I find that Gordon's net backpay total should be adjusted to $1670.16.

4. *Cindy Hayes*: Specification III alleges that Hayes' back pay period begins on or about April 1, 2001, and ends on or about August 10, 2002, the end of the last complete payroll period in which Hayes worked in the respiratory department. The calculation of Hayes backpay commences with 2001 Pay period No. 8 and continues through 2002 pay period No. 17. Her first PAF in that time period (R. Exh. 5) shows that she was rehired or recalled to work on April 2, 2001, for a PRN position, working 12-hour shifts on Friday and Saturday. Effective April 27, 2001, the Hospital converted Hayes to a full-time status. (R. Exh. 6.) She continued in that status until she converted back to a PRN status effective September 1, 2001. (R. Exh. 7.) Effective November 17, 2001, Hayes returned to full-time status. (R. Exh. 8.) In view of the evidence of her PRN status, I find that the following pay periods should be excluded from the calculation of Hayes' backpay: 2001 pay periods nos.

[9] The General Counsel did not allege Flores as a backpay claimant until Specification III presumably because he had not appeared on Respondent's payroll records provided prior to the hearing. The backpay calculation for him in Specification III ends as of July 18, 2009, the last records Respondent has provided to the General Counsel.

8, 9, and 19 through 24. Accordingly, I find that Hayes' net backpay total should be adjusted to $2920.36.

5. *Pedro Herrera*: Specification III alleges that Herrera's back pay period begins on or about August 17, 2008, and ends on or about June 6, 2009, the end of the last complete payroll period in which Herrera worked in the respiratory department.[10] Herrera's PAF (R. Exh. 24) shows that he was hired on June 18, 2008, as a PRN employee. Nothing shows any subsequent change in Herrera's status. Although Herrera's pay records show a spike in his work for a 6 to 7 month period beginning with 2008 pay period 18 and ending with 2009 pay period 6 that the compliance officer apparently used to qualify Herrera under the threshold employed by the General Counsel, Herrera's entire history of employment does not show the type of regularity that could be expected of the standard full-time employee. Accordingly, I find Herrera should be excluded as a PRN employee unless and until he becomes a full-time employee.

6. *Judith Para*: Specification III alleges that Parra's back pay period begins on or about August 6, 2006, and continues to date. Her PAFs reflect that her employment commenced on July 25, 2006, as a part-time employee and that she became a full-time employee effective March 30, 2008. (R. Exhs. 10 & 11.) Her testimony essentially confirms this work history. I find, therefore, that Para was a legitimate part-time employee until March 30, 2008, and that her backpay period should not commence until the 2008 pay period 9 rather than 2006 Pay Period 17 as shown in Specification III. Accordingly, I find that Para's net back pay total should be adjusted to $170.74.

7. *Dan Pattarozzi*: Specification III alleges that Pattarozzi's back pay period begins on or about September 9, 2001, and ends on or about April 20, 2002, the end of the last complete payroll period in which Pattarozzi worked in the respiratory department. His first PAF shows that he was hired into a PRN position on September 7, 2001. (R. Exh. 12.) His next PAF shows that he became a full-time employee effective November 19, 2001, the middle of 2001 pay period 24. (R. Exh. 13.) In Specification III, Pattarozzi's backpay effectively commences with 2001 Pay Period 20, a time in which he was in a PRN status. In view of the evidence of Pattarozzi's PRN status, I find that 2001 pay periods 20 – 24 should be excluded from the calculation of backpay and that his net backpay total should be adjusted to $4359.37.

8. *Nohail Syed*: Specification III effectively initiated Syed's accrual of backpay with 2006 pay period 3 and concluded it with 2008 pay period 19. Syed's work history as reflected in his PAFs shows that he was hired on January 16, 2006, as a part-time employee, converted to a full-time status effective August 19, 2007, and was transferred out of the respiratory department to the nursing home effective September 15, 2008. (R. Exhs. 14–16.) Syed's testimony essentially confirmed this work history. Based on Syed's PAFs and his own testimony, I find that he was a legitimate part-time employee initially and that his backpay should have commenced only when he became a full-time employee on August 19, 2007, the middle of 2007 Pay Period 18. Accordingly, I find that Syed's compensable backpay period should commence with 2007 pay period 19 and that his net back pay total should be adjusted to $4684.52.

I find no further adjustments in the calculations made in Specification III are warranted but that my conclusions with respect to Anthony Acosta and Michael Scott Loyd merit explanation. Apart from the conflicting PAFs, Acosta testified credibly that he worked as a full-time employee. Others who testified concerning him agreed. Even the PAF prepared when he was hired reflects an intention on the part of the Hospital to utilize him on a regular schedule (three 12-hour shifts per week) that closely approximated or equaled the weekly work hours of the undisputed full-time employees at that time. Having considered all the evidence pertaining to Acosta, I find that he worked as a full-time employee throughout the backpay period alleged for him in Specification III and that no adjustment should be made in his backpay computation.

I have reached a similar conclusion in the case of Michael Scott Loyd. Specification III alleges that Loyd's back pay period begins on or about October 15, 2006, and ends on or about February 16, 2008, the end of the last complete payroll period in which Loyd worked in the respiratory department. Loyd apparently worked for a period of time prior to October 15, 2006, as the only PAF Respondent offered in evidence for him (R. Exh. 9) shows a change in his work schedule from 40 to 36 hours per week effective October 12, 2006. This PAF for does not show whether Loyd's status changed from full time to part time, or to some other category. Hence, in the absence of other evidence that would warrant a finding of a change in status, I decline to find based on this terse form and, at best, Grant's self-serving definition of a full-time employee that Loyd ever became a part-time employee. [11]

III. OTHER OBJECTIONS ADVANCED BY RESPONDENT

Respondent's brief advances other objections to Specification III. First, virtually all of Respondent's various arguments assert that the unfair labor practice at issue here occurred on April 23, 2001, thereby implicitly asserting that that the backpay period is erroneous because it starts 3 weeks too early.

In all three of the specifications issued in this case, reimbursement for the reduction of hours commences with the 2001 pay period 8 that began on April 1 and ended on April 14. In asserting that the Board has "found" that the unlawful reduction in hours occurred on April 23, or the middle of 2001 pay period 9, Respondent relies on Judge Parke's listing of the issues presented for decision in the underlying case. See Issue 3(d), 342 NLRB 399. At no other place in any decision related to this case is that date mentioned.

However, Judge Parke's subsequent finding of fact quoted above specifies that the unlawful reduction in hours occurred "(s)ometime in April." Id. at 400. Later, she found that Respondent violated Section 8(a)(5) and (1) when it made several changes one of which she described, thusly, "April—reduction

[10] The use of Husted's name in Specification III, par. 12(a), is obviously inadvertent.

[11] In its answer to the first amended compliance specification Respondent alleged its belief that Loyd is now deceased. GC Exh. 1(ac), pp. 11–12. No information to the contrary was adduced at the hearing. If that is the case, any backpay due Loyd must be paid to his estate.

in respiratory department employees' hours." Id. at 401. In the remedy section, Judge Parke again referred to the reduction in hours as having occurred in "April 2001." Id. 404. And as previously noted, the Tenth Circuit also stated simply that this reduction in hours occurred in April 2001.

Accordingly, I find Respondent's assertion that the Board found that the unilateral reduction of hours in the respiratory department hours occurred on April 23 is not factually supported. In all probability, Judge Parke used that date in fashioning her statement of the issues in the case because that date was used by the General Counsel when drafting complaint paragraph 8(f). However, she did not narrow her findings of fact to that specific date, and I find no evidence that Respondent ever took exception to her failure to find that this unilateral change occurred on a specific date. Accordingly, I conclude that the Regional Director acted reasonably by including all of the April 2001 pay periods in his backpay calculation.

Second, Respondent contends that Specification III seeks a remedy for individuals who are outside the scope of the Board's decision, meaning those employees hired after the date of the unfair labor practice as alleged in Affirmative Defenses 36(a) and (c). Respondent argues that the Board did not intend for its remedy to apply prospectively and that it could not apply the remedy legally to unit employees hired after the date of the hours reduction.

To support the first prong of this argument, Respondent's counsel cites and contrasts *Cascade Painting Co*., 277 NLRB 926, 931 (1985), where the administrative law judge explicitly stated that a painting contractor's obligation to make whole all employees for losses incurred by reason of its repudiation of the terms of a collective-bargaining agreement included even those employees hired after the date of the unfair labor practice.

Respondent reads far too much into that case. The mere fact that a single administrative law judge happened to detail the prospective nature of the make-whole remedy in an 8(a)(5) unilateral change case does not serve to transform the character of the standard remedy in cases of this type. The standard remedial action required in cases of this kind applies to individuals employed in the affected unit until Respondent rescinds its unlawful change and bargains with the Union about any future changes. Here, Respondent still has not rescinded the change found unlawful so the reimbursement remedy continues to apply to each subsequently-hired employee.

In support of its contention that the Board could not *lawfully* apply its remedial order prospectively, Respondent cites two cases, *NLRB v. Dodson's Market, Inc*., 553 F.2d 617 (9th Cir. 1977), and *Teamsters Local Union No. 171 v. NLRB*, 425 F.2d 157 (4th Cir. 1970). Both cases are factually distinguishable.

In the *Dodson* case the regional director sought backpay for an part-time employee hired into a department that had earlier become overcrowded by reason of the employer's unlawful discriminatory conduct under Section 8(a)(3) on the ground that the employee's part-time status was the "derivative result" of the employer's earlier unfair labor practices. The court rejected this rationale finding that no discrimination had been practiced against the new part-time employee and the regional director had gone too far in applying a "but for" rationale to connect the respondent's discriminatory conduct to an employee about whom no evidence of discrimination existed. Id. 619–620.

The *Local 171* case is also factually distinguishable. In that case, a successor employer, reduced the wage rates of those represented employees hired from the predecessor employer without bargaining with their representative. In the underlying case, the trial examiner fashioned a fact-specific remedial order requiring backpay for those affected by the unilateral change when it occurred.[12] The regional director's backpay specification included both the employees who worked for the predecessor as well as those lower paid employees later hired or transferred into the successor operation beginning 2 months after the takeover and continuing over the course of the next 4 or 5 years. In the backpay proceeding, the trial examiner held that the remedial order did not contemplate its application to the employees who had never been employed by the predecessor because "the Board's Order, clearly refers only to the (predecessor's) employees who had been taken over by (the successor)." 175 NLRB 799. The *Local 171* case clearly turns on the conduct engaged in by a successor employer that probably would not even have been an unfair labor practice after the Supreme Court's 1972 *Burns* decision holding that a successor employer is generally free to establish its own terms and conditions of employment when it takes over the predecessor's operations. *Burns Detective Agency v. NLRB*, 406 U.S. 272 (1972).

Here, however, Respondent's unilateral change occurred outside any ownership transition similar to that found in *Local 171*. Respondent's unilateral change involved a permanent, department-wide reduction in the hours of work each week. As such, this change by its very nature would affect both present and future employees until rescinded. By contrast, the remedial order in the *Local 171* case was limited to a fixed group of employees, i.e., those who previously worked for the predecessor. Therefore, in *Local 171* the unlawful wage reduction could only affect employees previously paid the predecessor's higher rate. By contrast, Respondent's reduction in the weekly work schedule affected all full-time employees working when it occurred as well as those full-time employees who came later.

Accordingly, I find contrary to Respondent's contention that the Board could and did lawfully apply its remedial order in this case to all affected employees, both those employed at the time when it occurred and those employed thereafter.

Third, Respondent argues that interest on top of any backpay award would be punitive. I am not at liberty to consider this objection as Respondent waived that claim below by failing to except to Judge Parke's inclusion of interest in her the remedy. See Section 102.46(b)(2) of the Board's Rules and Regulations.

Fourth, Respondent complains that I erroneously denied its July 9, 2009 motion to dismiss the Specification II claiming

[12] Thus, the make-whole portion of the trial examiners proposed remedy which the Board adopted and a court later enforced, provided: "make employees whole for any economic loss they suffered as a result of (r)espondent's unlawful action by paying each of them the difference between (the predecessor's) prevailing wages on November 19 and the new scale of wages (the successor) placed them on at takeover (that afternoon)." *Overnight Transportation*, 175 NLRB 797, 798 (1969).

that the General Counsel failed to investigate and pled the employees' interim earnings. I hereby reaffirm the ruling I made at that time.

In its motion, Respondent claimed that monetary remedy here amounted to a "backpay award" rather than "some type of reimbursement" so that "interim earnings are of clear materiality." In rejecting that contention in my July 13, 2009 order denying Respondent's motion, I relied on the clear language in *Ogle Protection* case itself. The relevant portions states as follows:

> Notwithstanding that our original Decision and Order in these cases inadvertently specified that the *Woolworth* formula should be applied in computing the amounts due employees, it seems obvious and we find that the formula has no application in these cases. The Board's *Woolworth* formula was designed to prevent injustices to discriminatees who exercised their obligation to obtain interim employment, by providing that their interim earnings be offset against backpay on a quarterly basis only; otherwise, as described in the *Woolworth* decision itself, there was often a monetary incentive for an employer to delay reinstating an employee who had been discriminatorily discharged, if he had thereafter obtained higher paying interim employment. Other unwanted consequences also ensued. *On the other hand, where, as here, the amounts due employees result from Respondents' repudiation and failure to apply the terms of a collective-bargaining agreement, a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay, a quarterly computation is unnecessary and unwarranted.* In fact, application of the *Woolworth* formula in these circumstances would result in a windfall to some employees, who would now benefit from having their employer remit their accrued dues to the union, without ever having had these amounts deducted from their pay, solely because of the fortuitous circumstance that they happened not to have been entitled to unpaid contractual benefits for a particular quarter. We see no justification for such a result, and did not intend it.

Ogle Protection Service, supra at 683. (Emphasis mine) In rejecting Respondent's claims regarding interim earnings at that time, I concluded that holding otherwise in cases applying the *Ogle Protection* reimbursement remedy would have the effect of imposing a duty on employee victims of an unfair labor practice to moonlight in order to minimize the impact of the unlawful conduct for the benefit of the wrongdoer. Such an absurd and grossly unjust result is not and should never be required in cases of this nature. Accordingly, I again reject Respondent's claim about the need to investigate and plead interim earnings in cases of this type.

Finally, Respondent argues that it is entitled to a credit for the excess in "regular hours." In effect, the so-called excess in regular hours describes those weeks where the employee's pay records reflect that he or she worked more than 80 hours. At the hearing, Respondent's counsel stated that the Hospital did not care where the credit was applied so long as it received a credit. (Tr. 135)

Specification III (as well as the prior specifications) already provides Respondent the credit it seeks with this argument. In his testimony, the compliance officer explained that Respondent those hours beyond 80 per pay period where the employee presented herself or himself for work were treated as overtime hours and included for purposes of calculating the amount of nonregular hours worked. (Tr. 129–131; 144) Accordingly, I reject this claim for credit by Respondent as unnecessary because he has received credit for those hours in the computation of the nonregular hours.

IV. THE NEW PROCESS STEEL ISSUES

On March 25, 2009, the Board, then composed of two members, issued a Supplemental Decision and Order disposing of the General Counsel's motion to strike certain of Respondent's affirmative defenses as to Specification I, and denying his Motion for Summary Judgment except as to the backpay formula in subparagraphs 1 through 3 of paragraph 8. Later, the Regional Director issued Specification II and then Specification III, requiring in each case that Respondent file a timely answer. In every practical sense, the two subsequent compliance specifications rendered Specification I and the rulings made in connection with it moot. For this reason, it is my judgment that it would be unnecessary for the Board to revisit the March 25 Supplemental Decision and Order because of the U.S. Supreme Court's conclusion in *New Process Steel, LP v. NLRB*, 2010 WL 2400089 (June 17, 2010).

On June 28, 2010, Respondent filed a motion to dismiss the compliance specifications, alternatively, motion to exclude evidence from the Record. In this motion, Respondent makes several claims grounded on the *New Process Steel* decision. The General Counsel filed a response to the motion dated July 9, 2010. After carefully considering the respective arguments, I deny Respondent's motion in its entirety.

In its motion, Respondent asserts that the compliance specifications in this case are legally void because only two members served on the Board when they issued and, when issuing each of the specifications, the Regional Director specifically alluded to the fact that he acted on behalf of the Board. Respondent made a similar claim in its answer. Respondent also claims that the subpoenas used by the Regional Director to obtain Respondent's records were void for a like reason and, therefore, I should not consider the evidence obtained by them.[13]

Respondent's arguments about the Board's delegation of authority to the General Counsel and hence to the Regional Directors are not supported by *New Process Steel* nor any other case law. As the General Counsel correctly notes in his response to the motion, the Court stated in its *New Process Steel* decision that its holding "does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel." Id., slip op. at 10 fn. 4. In other words, the express language of *New Process Steel* exempts from the holding in that case the very delegations of authority

[13] The subpoenas at issue here were signed by the Board's Executive Secretary as provided in Section 102.31 of the Board's Rules and Regulations.

that Respondent questions by its motion. In addition, two courts of appeals have recently upheld the prior delegations to the General Counsel to seek court enforcement of Board orders and to seek injunctive relief under Section 10 (j). *NLRB v. C & C Roofing Supply, Inc.*, 569 F.3d 1096, 1098–1099 (9th Cir. 2009) (court-enforcement authority); *Muffley v. Spartan Mining Co.,* 570 F.3d at 539–540 (Section 10 (j) authority). The delegation at issue here is essentially identical to the court-enforcement authority addressed in the *C & C Roofing Supply* case.

As for the validity of the subpoenas, the statutory provision related to the Board's subpoena power is materially different than Section 3(b) of the Act that the Court interpreted in the *New Process Steel* case. Thus, the quorum question, the central issue in *New Process Steel*, does not arise with respect to the Board's subpoena power because Section 11 of the Act provides that "the Board or any member thereof" may issue subpoenas. Hence, the Board's Section 11 subpoena power may be exercised by a single Board member without regard to the presence of a quorum. For that reason, I find that the Board's delegation of authority to its Executive Secretary to sign subpoenas on its behalf as codified in Section 102.31 of the Board's Rules and Regulations remained in tact and lawful throughout the period of time when the Board consisted of only two members.

But the statute aside, Respondent's claim that the subpoenas were void on the ground of an improper delegation makes no difference even if it is assumed they were invalid. Here, Respondent had a preexisting legal duty to produce the documents sought by the subpoenas. The Board's order in the underlying case, issued in 2004 and enforced by the Tenth Circuit in 2007, stated at paragraph 2(f) that Respondent must:

> Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

As this language plainly states, all that is needed is "a request" for records necessary to compute the backpay due in the case. Hence, whether the Regional Director submitted his request for the records on an invalid subpoena form or a used cocktail napkin, Respondent was legally obliged to produce them to the Board "or its agents" within 14 days of receiving that request. To hold otherwise, would be tantamount to unilaterally revising the valid remedial action ordered by the Board and enforced by the court. Accordingly, I find that the evidence Respondent produced in response to the subpoenas in this case maybe be properly used as evidence in deciding this matter.

SUMMARY

Based on the findings above, I find the following amounts of backpay due to the employees listed below as of July 18, 2009.

Employee	Amount
Acosta, Anthony	$4807.11
Amanambu, Austin O.	$9583.99
Boyer, Ruth Mary	$29,510.09
Gordon, Natalia	$1670.16
Hayes, Cindy	$2920.36
Hustead, Charles	$306.91
Kavanaugh, Gary	$3435.09
Lopez, Rudolph R.	$15,344.35
Loyd, Michael Scott	$11,955.09
May Jr., David Allen	$16,092.74
Parra, Judith	$170.74
Pattarozzi, Daniel	$4359.37
Syed, Nohail	$4684.52
Total:	$104,840.52

Respondent may discharge its liability as of July 18, 2009, to each employee listed above by payment of the foregoing amount set opposite the employee's name, plus interest to the date of payment, less the normal withholding for federal, state, social security, and Medicare taxes required by the applicable federal, state, and social security tax laws.[14]

[14] Pursuant to Sec. 102.59 of the Board's Rules and Regulations, if no exceptions are filed as provided by Sec. 102.46 of the Rules, the findings, conclusions, and recommendations shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes. All pending motions inconsistent with these findings and conclusions are denied. General Counsel's request that I order Respondent to post the Notice to Employees is unnecessary as the Board's enforced order in the underlying case already requires that action. Such an order from me at this time would be redundant and would amount to the relitigation of a matter already resolved in the underlying proceeding. See *Chicago Educational Television Assn*., 308 NLRB 103 fn. 1 (1992).